



STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

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LEGAL MEMORANDUM 81-76

TO: ALL JUSTICES OF THE PEACE, STATE OF DELAWARE
ALL CONSTABLES, COURTS OF THE JUSTICES OF THE PEACE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: DECEMBER 2, 1981

RE: CAPIAS RETURNS BY JUSTICE OF THE PEACE CONSTABLES

On November 4, 1981, at approximately 2:00 p.m., Constable Bungy received a call for assistance from Constable Dawson who was located at the Mt. Vernon Apartments in search of a Mary Wiggins who had an outstanding capias out of Justice of the Peace Court No. 11 for failure to pay a Court fine in the amount of \$65. Constable Dawson had gone to the apartment in question and knocked on the door. A male answered and after questioning the Constable's authority, gave his name as John Deby. Mr. Deby proceeded to verbally abuse Constable Dawson who then proceeded to the rental office. The rental manager informed Constable Dawson that Mr. Deby was, in actuality, one Kenneth Wiggins. Constable Dawson called the New Castle County Capias Office and ascertained that there was also an outstanding capias on Kenneth Wiggins out of Justice of the Peace Court No. 11 for failure to pay a fine in the amount of \$77. Because Constable Dawson learned that

Kenneth Wiggins had recently been released from the Delaware Correctional Center and because of the abuse to which he had just been subjected at the hands of Mr. Wiggins, a.k.a. John Deby, Constable Dawson then requested assistance from Constable Bungy who responded to the Mt. Vernon Apartments. A call was also placed to the New Castle County Police Department for back-up assistance because of Wiggins' record and treatment of Constable Dawson. After waiting for more than forty (40) minutes for the police, who never did respond,¹ the two Constables carried out the arrest of Mr. Wiggins themselves. Even after his arrest, Mr. Wiggins was loud and abusive toward the Constables. He threatened them concerning their safety and threatened legal action against them.

Mr. Wiggins was transported to Justice of the Peace Court No. 11. Without questioning either Constable about the circumstances of the arrest, the presiding Justice of the Peace placed Mr. Wiggins in the Work Referral Program.

In light of the history of the case, the placement of Mr. Wiggins in the Work Referral Program was arguably inadvisable. A brief history of the case follows: On November 21, 1980, Wiggins was arrested for Failure to stop at a property damage accident in violation of 21 Del.C., §4201(a), and for Driving without a license in violation of 21 Del.C., §2701. On December 15, 1980, he was

¹By this Legal Memorandum, I request a greater degree of assistance from our State's police agencies when a request for back-up is made by a Justice of the Peace Constable.

arraigned and entered pleas of guilty to both charges. He was fined \$83 of which he paid \$10. He was placed under the deferred payment program with regard to his remaining fines. He never paid another cent towards the satisfaction of said fines. On January 12, 1981, a capias was issued out of Court No. 11 for failure to pay the rest of his fines. He was returned on said capias in June, 1981, and on June 8, 1981, he was placed under an unsecured bond to return to Court on June 15, 1981, at which time he was to designate whether he wanted placement under the Work Referral Program or to pay his fines under a deferred payment plan.² He never appeared on June 15, 1981. On July 31, 1981, a second capias was issued for failure to pay the \$77 in fines and Constable costs. On November 4, 1981, he was returned on this second capias. He was placed in the Work Referral Program. He was to report on November 9, 1981 to the Work Referral Program to work off 21 1/2 hours in satisfaction of his fines. He never reported.³

²A Justice of the Peace has a duty to note in a conspicuous place in the record of the case, e.g., the warrant, the deferred payment record, etc., that a particular defendant was, on a specified date, given the opportunity to participate in the Work Programs but that said defendant refused said option. With such a notation in the record of the case, a Justice of the Peace before whom the defendant is returned on a capias, issued for failure to pay a fine and other Court costs, will know that the Work Referral option need not be offered and may proceed, in his or her discretion, to utilize the provisions of 11 Del.C., §4105(b).

³It is not surprising, therefore, that on November 9, 1981, the Supervisor of the Work Programs wrote to the Court and informed the Court that as of said date, the defendant had not reported or completed an hour of the 21 1/2 hours of work ordered to be performed and so was being returned to the Court for further action. A third capias was

Admittedly, the presiding Judge's hands were somewhat tied. Afterall, a Judge may not incarcerate a person for failure to pay a fine. 11 Del.C., §4105(a). See generally: Legal Memorandum 81-70, dated October 20, 1981. Yet, it seems to me that a defendant who is given the option of entering the Work Referral Program after failing for over six (6) months to make a deferred payment and who, instead, chooses to continue with a deferred payment plan but who again fails to make any payment thereunder waives further Work Referral Program consideration when he is thereafter returned on a second capias. In such a case, a civil contempt citation brought pursuant to 11 Del.C., §4105(b) would not, in my view, be an abuse of judicial discretion. Fairness is one thing; blind trust is another. A defendant who, upon conviction, is offered an opportunity to avail himself of the Work Referral Program but who chooses not to avail himself of same may be held in civil contempt for his failure to pay his fines and other costs without the necessity of first ordering him into said Work Referral Program. As the Honorable Joseph T. Walsh, Associate Judge of the Superior Court, stated in the case of Bordley v. Ellingsworth and Knussman, Del.Super., C.A. No. 150 (1976):

"I am satisfied that the Court below properly advised this defendant that if he was unable to meet the payments, . . . he could use the Work Referral Program, but the burden was on him to contact the Court in that connection.

3 (continued)

issued. He was returned on this third capias within two weeks of its issuance, at which time the Court sentenced Mr. Wiggins to sixty (60) days incarceration in satisfaction of his fines and costs pursuant to 11 Del.C., §4105(b).

It is clear that he failed to make any payments. . . . It is also clear that he did not contact the Court to use the alternative Work Referral Program.

From October 7, 1975 until he was arrested on a capias in March of 1976, he made no attempt to contact the Court. . . . When the defendant was finally arrested it is clear that the Court was authorized to impose a civil contempt penalty for his failure to comply with the direction to avail himself of the Work Referral Program.

When the defendant was incarcerated, he elected to petition the Court that he was then prepared to comply with the Court's order that he report to Work Referral. The Court below, in its discretion, for reasons with which it was most familiar, decided that the defendant could not be trusted at his word, that he would not in good faith attempt to do what he had previously spurned doing, and I cannot say that the Court abused its discretion."

Further, it seems to me that the Judge before whom a capias returnee appears would want to know the circumstances of the return. Did he come in voluntarily? Was force needed to effectuate the capias? Did he resist arrest? Was this a first capias or had a prior capias been issued with regard to the case? Did he give false information? These and other questions could properly be addressed to the Constable making the capias return. From such a dialogue it might well develop that other criminal charges, such as Terroristic threatening, Resisting arrest, Criminal contempt, etc., would be warranted.

The point here is that a Constable quite understandably feels put upon when he exposes himself to danger in the execution of a

capias only to see the capias returnee leave the Courthouse unescorted moments after his delivery there.⁴ The Judge should encourage input from the Constable on the circumstances of the return so as to be in a position to frame an appropriate order with regard to the defendant's status. For example, it may develop that secured bail is warranted. Chapter 21 of Title 11 of the Delaware Code, as amended, Delaware's bail statute, encompasses not only the setting of bail prior to conviction but also the setting of bail subsequent to conviction. See 11 Del.C., §2105(a); 11 Del.C., §2107(b). One factor in determining whether secured or unsecured bail is warranted, is that the Court shall consider a defendant's record of appearances at Court proceedings. 11 Del.C., §2105(b). Failure to appear to pay a fine after a conviction is a legitimate factor which the Court may consider in determining whether to set secured bail on a capias returnee.⁵ Further, a dialogue between the Justice of the Peace and

⁴This feeling is, no doubt, accentuated when a Judge opts to return the defendant to a deferred payment plan, after having already been given an opportunity to satisfy his debt by the deferred payment route. Such a decision could well lead a Constable to feel that it is fruitless to even execute Justice of the Peace Court capias.

⁵For example, in a case where it is readily apparent that a non-indigent defendant is unwilling to abide by the Court's mandate to pay fines and costs, the Court may want to reflect upon its options for a couple of days. In such a case, secured bail to ensure the defendant's reappearance would be warranted, the amount thereof perhaps being in the sum of the fines plus costs due. Also, secured bail might be set by the Justice of the Peace before whom the capias returnee is brought with an order that the defendant be returned to the Court at a specific time when the sentencing Justice of the Peace is on duty under the theory that said Judge is familiar with the defendant's case and is, therefore, in a better position to act upon the capias.

the Constable should lead the Constable to appreciate certain sentencing constraints placed upon the Justice of the Peace.⁶

The execution of capias is one of the most important duties performed by a Justice of the Peace Constable. The duty does not end in my view, however, until he reports to the presiding Justice of the Peace the circumstances of the return. In that way, the Court will be better able to perform its own duties with regard to ensuring that the mandate of the Court is carried out.

⁶See Legal Memorandum 81-70, dated October 20, 1981.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence N. Sullivan
The Honorable William J. O'Rourke
The Honorable Richard J. McMahon, State Prosecutor
Bruce M. Stargatt, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
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